ORIGINAL

No. 05 - 7058

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

ORIGINAL

Lorenzo L. Jones,

*Petitioner,*

v.

Barbara Bock et al.,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

**SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

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Jean-Claude André
(Counsel of Record)
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

November 14, 2005

BEST AVAILABLE COPY

**SUPPLEMENTAL BRIEF**
**IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

Pursuant to Supreme Court Rule 15.8, Petitioner Lorenzo L. Jones submits this supplemental brief in support of his October 13, 2005, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit. *See* Sup. Ct. R. 15.8 ("Any party may file a supplemental brief at any time while a petition for certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing."); *see also* Robert L. Stern et al., SUPREME COURT PRACTICE § 6.39, at 463-64 (8th ed. 2002).

As explained in the petition, the federal courts of appeals are intractably and increasingly split over the second question presented:

> Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

Pet. at i.

On November 1, 2005 – almost three weeks after the petition was filed – the Ninth Circuit published its decision in *Lira v. Herrera*, No. 02-16325, — F.3d —, 2005 WL 2850115 (CA9 Nov. 1, 2005), which bears directly on this question and widens the split among the circuits. Prior to *Lira*, the Ninth Circuit had not taken a position on whether the PLRA requires dismissal of a "mixed" PLRA complaint in its entirety, and as noted in the petition, the district courts within the Ninth Circuit were sharply divided. Pet. at 23 (cataloguing disagreement among district courts within the Ninth Circuit).

In *Lira*, the Ninth Circuit rejected the total exhaustion rule[1] first articulated by the Tenth Circuit in *Ross v. City of Bernalillo*, 365 F.3d 1181, 1182 (CA10 2004), adopted by the Sixth Circuit in *Jones Bey v. Johnson*, 407 F.3d 801, 809 (CA6 2005) – the prior Sixth Circuit precedent on which the court below relied in this case – and practiced by the Third Circuit in *Vazquez v. Ragonese*, 142 Fed. Appx. 606, 606 (CA3 2005). It then expressly "agree[d], with some caveats, that the Second Circuit's approach [in *Ortiz v. McBride*, 380 F.3d 649, 651 (CA2 2004), *cert. denied*, 125 S. Ct. 1398 (2005),] is appropriate." *Lira*, 2005 WL 2850115 at *5. In doing so, it also aligned itself with the three additional circuits – the Fifth, Seventh, and Eighth Circuits – that practice partial exhaustion. *See Johnson v. Johnson*, 385 F.3d 503, 533 (CA5 2004) (dismissing only unexhausted claims from a mixed PLRA complaint); *Lewis v. Washington*, 300 F.3d 829, 836 (CA7 2003) (affirming dismissal of one claim for failure to exhaust but remanding for determination of whether other claim was exhausted); *Kozohorsky v. Harman*, 332 F.3d 1141, 1144 (CA8 2003) (requiring district courts to allow PLRA plaintiffs to amend their complaints to delete any unexhausted claims).

As *Lira* and the split that it widens illustrate, clarification of the meaning of the PLRA's exhaustion requirement is of substantial public importance. And, as a coalition of twenty-two states – including the State of Michigan – and the District of Columbia recently acknowledged in another PLRA exhaustion case, "the substantial public importance of clarifying the meaning of the PLRA's exhaustion requirement" "makes this petition cert-worthy." Brief of the States of

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[1] Rather than employ the term "total exhaustion" as used by every other case presenting this issue and as used throughout the petition, *Lira* "use[s] the term 'total exhaustion dismissal.'" 2005 WL 2850115. The distinction is purely semantic.

New York et al. as *Amici Curiae*, *Woodford v. Ngo*, No. 05-416, at 3-4.[2]

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jean-Claude André
(Counsel of Record)
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

November 14, 2005

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[2] At issue in *Ngo* is whether "a prisoner satisf[ies] the Prison Reform Litigation Act's administrative-exhaustion requirement by filing an untimely or procedurally defective administrative appeal." Petition for Certiorari, *Woodford v.Ngo*, No. 05-416, at i. The same issue is also presented in *Johnson v. Meadows*, 418 F.3d 1152 (CA11 2005), *pet. for cert. filed* Sep. 8, 2005 (No. 05-6336), and *Feuer v. McCollum*, 139 Fed. Appx. 928 (CA10 2005), *pet. for cert. filed* Nov. 10, 2005 (not yet docketed).

While as important and as worthy of this Court's consideration, the question presented in *Ngo*, *Johnson*, and *Feuer*, will not resolve the issues presented in this case.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2005

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**CERTIFICATE OF SERVICE**

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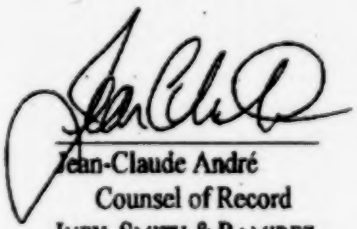
I, Jean-Claude André, a member of the Bar of this Court, hereby certify that on November 14, 2005, as required by Supreme Court Rule 29, the enclosed SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI was served by first-class mail, postage prepaid, on counsel for Respondents:

Thomas L. Casey, Michigan Solicitor General
Michigan Department of Attorney General
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909

I further certify that all parties required to be served have been served.



Jean-Claude André
Counsel of Record
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Los Angeles, CA 90034
(310) 558-0932